

NOT TO BE PUBLISHED

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

TYRUS CARDELL POTTS,

Defendant and Appellant.

2d Crim. No. B154292
(Super. Ct. No. 2001005111)
(Ventura County)

Tyrus Cardell Potts appeals a judgment after conviction of attempted murder, second degree robbery, and attempted carjacking, with a finding of personal firearm use. (Pen. Code, §§ 664, 187, subd. (a), 211, 215, subd. (a), 12022.7, 12022.53, subds. (b), (c), and (d).)¹ We affirm.

FACTS

In the late afternoon of February 20, 2001, David Makiri drove from his pawnshop business ("Loans R Us") on Vermont Avenue in Los Angeles to Simi Valley to visit a friend. Makiri parked his automobile on Elvado Drive near his friend's residence. He left his automobile and reached into the back seat to retrieve

¹ All statutory references are to the Penal Code.

his briefcase. Suddenly, a man wearing a dark leather jacket grabbed Makiri's neck and placed a firearm to his head. At trial, Makiri identified Potts as the gunman.

A second man, Donnell Allen, stood several feet away. Either Potts or Allen said, "Give us your money," and demanded Makiri's wallet and car keys. Makiri pretended to toss the car keys away. This angered Allen. He took Makiri's briefcase and ordered Potts to "Shoot him, kill him."

Potts stepped back and pointed the gun at Makiri's chest. He then turned the gun sideways to fire the weapon "sideways" or "ghetto style." After turning, the gun was pointing "a little down" and was "lower[ed] . . . somewhat." Potts fired the gun and Makiri received a gunshot wound in the leg, near and below the knee. Potts fired a second time and struck the hubcap of Makiri's automobile.

Potts and Allen then ran to a large, two-tone automobile in which a third man waited. Makiri was able to walk to his friend's residence and summoned assistance.

Simi Valley Police Officer John Parks heard a radio broadcast regarding the assailants and a description of their automobile. He soon saw a Cadillac driven by Allen with two passengers leaving Simi Valley. Parks attempted to stop the Cadillac. Allen drove for approximately six miles before stopping.

Police officers searched the Cadillac and found Makiri's briefcase on the floor of the back seat, but did not find a firearm or ammunition. Potts, the front seat passenger, told the officers he had not handled a firearm that evening.

At trial, Detective Jay Carrott testified that firing a firearm turned "sideways" was "quite the . . . humor" at the police academy because that position resulted in inaccuracy. A bullet, however, can have an upward trajectory from a firearm discharged in that position. A criminalist examined samples taken from Potts's hands and opined that he had gunshot residue on his right hand.

Potts testified at trial that he accompanied Allen and another man as they followed Makiri to Simi Valley. He admitted holding a gun to Makiri's head "to scare him." Potts stated that he did not hear Allen direct him to shoot or to kill Makiri. He testified that he did not aim the gun at Makiri's head or knee but only at the ground. Potts stated: "I just fired two times at the ground." Potts demonstrated to the trial court how he held and aimed the firearm.

After a court trial, Potts was convicted of attempted murder, second degree robbery, and attempted carjacking. (§§ 664, 187, subd. (a), 211, 215, subd. (a).) The court found that Potts personally used a firearm that resulted in great bodily injury. (§§ 12022.7, 12022.53, subd. (d).) The trial court sentenced him to a prison term of 32 years to life.

Potts appeals and contends: 1) the trial court's finding of implied malice cannot support a conviction of attempted murder, and 2) there is insufficient evidence of his intent to kill Makiri.

DISCUSSION

I.

Potts argues that his conviction of attempted murder cannot rest upon a finding of implied malice. (*People v. Lee* (1987) 43 Cal.3d 666, 670 ["[S]pecific intent to kill is a requisite element of attempted murder, and . . . mere implied malice is an insufficient basis on which to sustain such a charge"]; *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690 specific [intent to kill is a required element of attempted murder].) He points to the trial court's reasoning that the firing of the firearm at Makiri was "a wanton act with total disregard for life"

Potts is correct that a necessary element of attempted murder is the intent to kill. (*People v. Lee, supra*, 43 Cal.3d 666, 670-671 ["[T]he crime of attempt to commit murder [requires] a specific intent to kill or, in other words, *express malice*."].) Although the trial court here may have described Potts's actions

as "wanton" and having a "total disregard for life," it stated that it found express malice: "Stepping back and pointing and shooting at a human being, I think there was the intent to kill. There was the statement[] of 'Kill him, kill him.'"

Moreover, the trial court rejected the defense argument that Potts's poor marksmanship indicated a less culpable state of mind: "[W]hat they aim at is not necessarily what they hit, whether it be a SWAT team member or [someone else]." (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945 [that gunman fires only once and abandons efforts or that gunman has poor marksmanship does not necessarily establish lack of intent to kill].) The remarks regarding wanton acts or implied malice are superfluous in view of the trial court's finding of express malice, or specific intent to kill. Moreover, the prosecutor and defense counsel each argued the issue of specific intent to kill during summation. We presume that the trial court properly followed established law regarding the requisite elements of the crime of attempted murder. (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913.)

II.

Potts contends there is insufficient evidence that he intended to kill Makiri or that he took a direct but ineffectual act toward killing him. (*People v. Chinchilla, supra*, 52 Cal.App.4th 683, 690 [elements of attempted murder].) He points to his testimony that he aimed the gun lower than Makiri's chest and that he fired it downwards toward the ground to scare him. Potts adds that a shooting at close range indicates an intent to shoot and disable, but not necessarily a specific intent to kill. (*People v. Ratliff* (1986) 41 Cal.3d 675, 695.) He also relies upon the victim's comments at sentencing that he did not believe that Potts intended to kill him.

In assessing a claim of insufficient evidence, we review the entire record to determine whether it discloses reasonable and credible evidence to allow a reasonable trier of fact to determine guilt beyond a reasonable doubt. (*People v.*

Rodriguez (1999) 20 Cal.4th 1, 11.) We draw all reasonable inferences therefrom in favor of the judgment. (*Ibid.*) Matters of credibility of witnesses and weight of the evidence are "the exclusive province" of the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We do not substitute our evaluation of a witness's credibility for that of the trier of fact. (*Ibid.*)

Attempted murder requires the intent to commit murder plus a direct but ineffectual act toward its commission. (*People v. Chinchilla, supra*, 52 Cal.App.4th 683, 690.) Rarely does direct evidence of defendant's intent exist. (*Ibid.*; *People v. Lashley, supra*, 1 Cal.App.4th 938, 945-946 ["One who intentionally attempts to kill another does not often declare his state of mind either before, at, or after the moment he shoots."].) Usually the trier of fact infers intent from the circumstances of the shooting, particularly the defendant's actions.

The question of defendant's intent is a factual one. (*People v. Lashley, supra*, 1 Cal.App.4th 938, 945-946.) Moreover, an successful killing is not conclusive evidence of lack of specific intent to kill. (*Id.*, at p. 945.) "There is nothing inherently illogical or absurd in a finding that a person who unsuccessfully attempted to kill another did so with the intent to kill." (*Ibid.*)

Sufficient evidence supports the court's finding of specific intent. After following and robbing Makiri, Potts twice fired a gun at him from a distance of approximately eight feet. (*People v. Jackson* (1989) 49 Cal.3d 1170, 1201 [firing a shotgun from a close distance permits an inference of intent to kill].) Prior to the shooting, Allen ordered Potts to "shoot" and "kill" Makiri. Potts and his crime partners fled the crime scene immediately after the shooting.

Potts demonstrated to the trial court the manner in which he held the gun and aimed at Makiri. Detective Carrott testified that a firearm held sideways could fire either in a downwards or upwards manner. The trial court was free to reject Potts's explanation that he fired the weapon toward the ground.

Moreover, the victim's comment at sentencing was not evidence offered to the trial court to determine guilt. In assessing the sufficiency of the evidence to support Potts's conviction, we are limited to the evidence admitted at trial.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Ken W. Riley, Judge

Superior Court County of Ventura

Susan B. Lascher, under appointment by the Court of Appeal, for
Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Ana R.
Duarte, and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and
Respondent.